



Fall 1984

Definitional Loopholes Limit New Mexico Countries Authority to Regulate Subdivisions

Amy Landau

Recommended Citation

Amy Landau, *Definitional Loopholes Limit New Mexico Countries Authority to Regulate Subdivisions*, 24 NAT. RES. J. 1083 (1984).

Available at: <https://digitalrepository.unm.edu/nrj/vol24/iss4/10>

This Note is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

DEFINITIONAL LOOPHOLES LIMIT NEW MEXICO COUNTIES' AUTHORITY TO REGULATE SUBDIVISIONS

LAND USE—COUNTY SUBDIVISION REGULATION IN NEW MEXICO: Vague, ambiguous, and indefinite statutory definitions create enforcement difficulties limiting regulatory protection and the counties' authority over land use control and subdivision activity. N.M. Stat. Ann. §§47-6-1 to -29 (1978 & Repl. Pamp. 1982).

INTRODUCTION

The New Mexico Subdivision Act (Act)¹ governs subdivision activity outside municipal boundaries. The Act grants the counties the power to adopt county subdivision regulations,² to approve county subdivision plats,³ and to enforce the provisions of the Act.⁴ The New Mexico Supreme Court has upheld the Act and the board of county commissioners' power to adopt, promulgate, and enforce the subdivision regulations as a proper exercise of legislative police power for the purpose of protecting the public health, safety, and welfare.⁵ But unfortunately the "subdivi-

1. Ch. 348, 1973 N.M. LAWS 1552 (codified as amended at N.M. STAT. ANN. §§47-6-1 to -29 (1978 & Repl. Pamp. 1982)) (First codified at N.M. Stat. Ann. §§70-5-1 to -29 (1953)). New Mexico Subdivision Act, ch. 172, 1979 N.M. LAWS 616 first amended the Act and, following the Court of Appeals decision in *State v. Select Western Lands, Inc.*, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979), New Mexico Subdivision Act, ch. 148, 1981 N.M. LAWS 913 further amended the Act. This note discusses the Court of Appeals' decision prior to the amendments as well as the legislature's subsequent amendments to N.M. STAT. ANN. §47-6-2 (1978) (New Mexico Subdivision Act Definitions) in the belief that there remains a continuing need for clarity and simplification of the Definitions to ensure the Act's effectiveness.

2. N.M. STAT. ANN. §47-6-9 (1978 & Repl. Pamp. 1982).

3. N.M. STAT. ANN. §§47-6-11 to -13 (1978 & Repl. Pamp. 1982). N.M. STAT. ANN. §47-6-6 (1978 & Repl. Pamp. 1982) requires all plats filed with the county clerk be approved as provided in the New Mexico Subdivision Act if the plat is subject to the Act's authority.

4. N.M. STAT. ANN. §§47-6-25 to -27.1 (1978 & Repl. Pamp. 1982) permit revocation of plat approval for non-compliance with scheduled requirements approved by the board of county commissioners, civil investigation for violations of the Act, injunctive relief, mandamus, criminal penalties, and private remedies.

5. The county is a political subdivision of the state and it possesses only such powers as are expressly granted to it by the legislature together with those powers necessarily implied to implement such express powers. *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs*, 89 N.M. 313, 551 P.2d 1360 (1976). Regulations permitting the board of county commissioners to suspend or revoke plat approval because of failure to comply with the material provision of disclosure statement was reasonable exercise of power delegated to board by the New Mexico Subdivision Act to adopt, promulgate, and enforce subdivision regulations. *Parker v. Board of County Comm'rs*, 93 N.M. 641, 603 P.2d 1098 (1979). Police power may be exercised only to protect and promote safety, health, morals and general welfare. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964) (regulation in zoning ordinance valid exercise of police power granted to city).

sion" definitions⁶ continue to create statutory construction problems and enforcement difficulties, limiting the Act's effectiveness.

The "subdivision" definitions⁷ delineate the Act's authority and the circumstances under which a person may be subject to the Act. If a person cannot be construed as a "subdivider"⁸ and his conduct as "subdivision,"⁹ the Act and its provisions may not be applicable even if subdivision¹⁰ activity has, in fact, occurred. *State v. Select Western Lands, Inc.*,¹¹ a recent judicial interpretation, illustrates one manner in which these definitions have been construed contrary to the purpose of the Act. If the "subdivision" definitions are not clarified and simplified, both the Act

6. N.M. STAT. ANN. § 47-6-2 (G), (H), (I), (K) (1978 & Repl. Pamp. 1982) (defining "subdivide," "subdivider," "subdivision," and "common promotional plan" respectively). Reference to one definition within another definition necessitates construction of all four definitions when determining whether the Act applies.

7. See discussion, *supra* note 6.

8. N.M. STAT. ANN. § 47-6-2(H) (1978 & Repl. Pamp. 1982) defines "subdivider" as any person creating or *who has created a subdivision, individually or as part of a common promotional plan* or any person engaged in the sale or lease of subdivided land which is being sold or leased *or has been sold or leased within the preceding three years* by the owner in the ordinary course of business; *however, subdivider does not include any duly licensed real estate broker or salesperson not acting on his own account.*

Italicized words indicate 1981 amendments.

9. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982) defines "subdivision" as: an area of land within New Mexico, the surface of which has been divided by a subdivider into five or more parcels within three years for the purpose of sale or lease. Subdivision does not include:

- (1) any land retained by the subdivider after *an approved subdivision has been created* but which has not been divided for a subdivision;
- (2) the sale or lease of apartments, offices, stores or similar space within a building;
- (3) subdivisions within the boundaries of a municipality or which are annexed by a municipality or which are annexed by a municipality at the time of approval of the subdivision by the municipality;
- (4) any division of land in which only gas, oil, mineral, or water rights are severed from the surface ownership of the land;
- (5) any division of land created by court order, except court orders involving land grant adjudications;
- (6) the leasing of land for grazing or farming activities;
- (7) the alteration of parcel boundaries within a previously approved subdivision where parcels are altered for the purpose of increasing or reducing the size of contiguous parcels and where the number of parcels is not increased nor the type of the subdivision changed; or
- (8) the sale or leasing of parcels of land retained by a subdivider after subdivision, which parcels are not contiguous to each other; provided, each one is sold or leased with legal access and sold or leased to an owner of land adjoining thereto and provided that the subdivider file a legal description or plat thereof in accordance with the provisions of Section 14-8-16 NMSA 1978.

Italicized words indicate 1981 amendments.

10. Here "subdivision" refers to generic land divisions not subject to the Act's authority because the type or method of land division used is exempt within the meaning of the Act's definitions.

11. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979). The case construed the N.M. STAT. ANN. §§ 47-6-2(G), (H), (I) (1978) definitions against the state and thus limited the Act's authority.

and the counties' efforts to protect consumers, to regulate subdivisions,¹² to protect land use, and to manage development may be thwarted again in the future.

BACKGROUND

The 1963 Land Subdivision Act (1963 Act)¹³ was the New Mexico legislature's first attempt to regulate subdivision activity and sales in the unincorporated areas of New Mexico's counties. The 1963 Act was meant to provide meaningful review and approval requirements for county subdivisions and consumer protection for the purchasers of subdivided land.¹⁴ But the "subdivision" activity regulated by the 1963 Act was limited to the division or proposed division of "improved or unimproved land divided, or proposed to be divided, into twenty-five or more lots or parcels for the purpose of sale or lease. . . ."¹⁵ Subdividers were required to obtain plat approval.¹⁶ But the 1963 Act did not enable the counties to establish standards or regulations to maintain qualitative control and protective management over land use and environmental concerns.¹⁷

The 1973 Act¹⁸ which regulates all subdivisions occurring after the Act's effective date¹⁹ expanded the 1963 Act's grant of authority and the

12. The purpose of subdivision regulation is to promote orderly and planned physical and economical growth of undeveloped areas. Subdivision regulation typically addresses street planning, neighborhood planning, and open space planning. Subdivision regulation also attempts to protect the community from financial loss resulting from imperfect development. 3 R.M. ANDERSON, *AMERICAN LAW OF ZONING* § 19.03 (1968).

13. N.M. STAT. ANN. §§ 47-5-1 to -8 (1978) (originally enacted as Land Subdivision Act, ch. 217 1963 N.M. LAWS 412 first codified as N.M. STAT. ANN. §§ 70-3-1 to -8 (1953)).

14. STATE OF NEW MEXICO OFFICE OF THE ATTORNEY GENERAL, *SUBDIVIDING LAND IN NEW MEXICO, A GUIDE FOR SUBDIVIDERS, LAND USE ADMINISTRATORS, PUBLIC OFFICIALS AND LAND PURCHASERS* 6 (Nov. 1980 & Supp. July 1981) [hereinafter cited as *SUBDIVIDING LAND*].

15. N.M. STAT. ANN. § 47-5-2(A) (1978).

16. N.M. STAT. ANN. § 47-5-3 (1978).

17. *SUBDIVIDING LAND*, *supra* note 14, at 6.

18. N.M. STAT. ANN. §§ 47-6-1 to -29 (1978 & Repl. Pam. 1982). The 1963 Act commonly referred to as the Land Subdivision Act was not repealed when the New Mexico Subdivision Act was enacted. The Land Subdivision Act still applies to all subdivisions approved under the 1963 Act and prior to the 1973 Act.

19. The 1973 Act took effect on April 3, 1973. New Mexico Subdivision Act, ch. 348, 1973 N.M. LAWS 1552. The provision concerning Advertising Standards, N.M. STAT. ANN. § 47-6-18 (1978 & Repl. Pam. 1982), became applicable to ALL sales and leases of subdivided land commencing six months after April 3, 1973. New Mexico Subdivision Act, ch. 348, 1973 N.M. LAWS 1552. The attorney general's office estimates that prior to 1973, over 1 million acres of land were subdivided. Interview with Anita P. Miller, Assistant Attorney General, Consumer Division, Office of the Attorney General (July, 1984). These lots are not subject to county regulation under the 1973 Act but any sales or leases of the subdivided lots are subject to the 1973 Advertising Standards. *Id.* Violations of the advertising and disclosure standards may be prosecuted under the 1973 Act and the Unfair Practices Act N.M. STAT. ANN. §§ 57-12-1 to -16 (1978). *Id.*

counties' powers to control subdivisions by enlarging the scope of "subdivision" activity and sales regulated by the counties. The Act enabled the counties to assert jurisdiction over "an area of land within New Mexico, the surface of which has been divided by a subdivider into five or more parcels within three years for the purpose of sale or lease."²⁰ Unfortunately the definitions,²¹ which were designed to expand and clarify the scope of the Act, have the potential instead, when strictly construed, to limit the Act's effectiveness and the counties' authority.²²

SCOPE OF THE ACT

The 1973 Act required each county to adopt regulations²³ setting forth its subdivision requirements relating to water needs and quality, liquid and solid waste disposal, access and road construction, terrain management, and phased development. The Act allowed the counties to adopt more stringent, but not less stringent, regulations than those in the Act.²⁴ Following adoption of the regulations the Act, with each county's regulations, governs subdivision activity and sales in the particular county.²⁵

The primary responsibility for subdivision approval remains with the county.²⁶ Unless the county commissioners have approved a plat,²⁷ the sale or lease of land is illegal,²⁸ improvements to the land may be prohibited, and building permits may be withheld.²⁹ By requiring compliance with the Act and regulations prior to plat approval,³⁰ the county can condition development upon a subdivider's specific performance of construction requirements based on local needs and environmental factors.³¹

20. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982).

21. Here the "definitions" refers to the definitions in N.M. STAT. ANN. § 47-6-2(G), (H), (I) (1978) because the 1981 amendments to the definitions have not yet been construed by the courts.

22. See discussion, *supra* note 11.

23. N.M. STAT. ANN. § 47-6-9(A) (1978 & Repl. Pamp. 1982).

24. For example, the counties may set a higher standard by requiring minimum 2 acre lots in areas with water shortages. But the counties cannot change the three year time limitation within the Act's "subdivision" definition to a two year time limitation. Interview with Anita P. Miller, *supra* note 19.

25. N.M. STAT. ANN. § 47-6-9 (1978 & Repl. Pamp. 1982).

26. N.M. STAT. ANN. §§ 47-6-6, -9, -11, -13 (1978 & Repl. Pamp. 1982).

27. A "plat" is "a map, chart, survey, plan or replat certified by a licensed, registered land surveyor containing a description of the subdivided land with ties to permanent monuments." N.M. STAT. ANN. § 47-6-2(D) (1978 & Repl. Pamp. 1982). The recording of a plat is a privilege, not a right, and a municipality does not impinge upon a right when it requires that reasonable standards be met before the privilege of recording may be executed. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964).

28. N.M. STAT. ANN. § 47-6-8 (1978 & Repl. Pamp. 1982).

29. 3 R.M. ANDERSON, *AMERICAN LAW OF ZONING* § 19.07 (1968).

30. N.M. STAT. ANN. § 47-6-6 (1978 & Repl. Pamp. 1982).

31. N.M. STAT. ANN. § 47-6-24 (1978 & Repl. Pamp. 1982) authorizes the counties to condition plat approval upon submission of a schedule of compliance with county subdivision regulations that is acceptable to the board of county commissioners which the subdivider agrees to make prior to

The Act requires subdivisions having the greatest population potential to comply with more stringent approval requirements.³² Specific types of subdivision proposals require the county to solicit state agency opinions regarding a proposal's adequacy.³³ Agency opinions are advisory only but adverse comments may be used by the county as the basis for denying plat approval.³⁴ The board of county commissioners retains the final authority for granting variances, approvals, and denials for all subdivision plats within its jurisdiction, but a party adversely affected by a decision may appeal to the district court.³⁵

Consumer protection for land purchasers is another major concern of the Act.³⁶ In the past, the consumer division of the attorney general's office has issued official opinions concerning application of the Act.³⁷ But currently the consumer division provides unofficial advice and staff support directly to the counties when actual controversies arise. Instead of automatically referring subdivision violations to the courts, the attorney general prefers negotiating settlements between the district attorney, the county, and the "illegal" subdivider in order to resolve conflicts as quickly as possible.³⁸

Enforcement provisions in the Act include private remedies, injunctive relief, and penalties for violation of the Act's requirements.³⁹ A misdemeanor conviction based upon any violation of the Act requires proof of and a finding of general criminal intent.⁴⁰

sale of lots. Examples of such required compliances include construction of roads which meet county specifications, of fire protection systems, of water supply systems, and of septic systems.

32. The Act defines the type of subdivision based upon population potential. Once the type of subdivision classification has been determined, the Act's and the county's subdivision regulations provide specific approval requirements based upon the type classification. See N.M. STAT. ANN. § 47-6-2(L), (M), (N), (O), (P) (1978 & Repl. Pamp. 1982) (defining "type-one subdivision," "type-two subdivision," "type-three subdivision," "type-four subdivision," and "type-five subdivision" respectively).

33. N.M. STAT. ANN. § 47-6-11 (1978 & Repl. Pamp. 1982) requires the county to obtain agency opinions from the State Engineer, the Environmental Improvement Division, the Soil and Water Conservation District, and the State Highway Department for type-one and type-two subdivisions. The opinions address the issues of whether a subdivider can fulfill his development proposals and whether the proposals conform to county regulations.

34. N.M. STAT. ANN. §§ 47-6-11, -14 (1978 & Repl. Pamp. 1982).

35. N.M. STAT. ANN. § 47-6-15 (1978 & Repl. Pamp. 1982).

36. SUBDIVIDING LAND, *supra* note 14, at 6. The legislature originally enacted county subdivision regulations for disclosure purposes. *Id.* The New Mexico Subdivision Act has evolved into an environmental statute. Interview with Anita P. Miller, *supra* note 19.

37. See Defendant-Appellant's Brief at 8, *State v. Select Western Lands, Inc.*, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979) [hereinafter cited as Defendant-Appellant's Brief in Chief].

38. Interview with Anita P. Miller, Assistant Attorney General, Consumer Division, Office of the Attorney General, responsible for enforcement of real estate subdivision statutes and consumer related real property matters (July, 1984). Settlements provide faster resolution of disputes for both the counties and the land purchasers. Examples include developers who have agreed to regrade roads according to county specifications, to provide fire protection for subdivisions, and to repurchase property from dissatisfied lot owners. *Id.*

39. N.M. STAT. ANN. §§ 47-6-25 to -27.1 (1978 & Repl. Pamp. 1982).

40. N.M. STAT. ANN. § 47-6-27(D) (1978 & Repl. Pamp. 1982) requires a finding of general

The Unfair Practices Act⁴¹ permits the attorney general also to prosecute "illegal" subdividers for misrepresentation and fraud in relation to the Subdivision Act's disclosure and advertising standards.⁴² If the attorney general has reasonable belief that the subdivider failed to disclose the true condition of the subdivided lots, he may bring an action alleging violation of the Unfair Practices Act and petition the district court for temporary or permanent injunctive relief and restitution.⁴³ Violations of assurance of discontinuance and settlement are themselves causes of action subject to civil penalties not exceeding \$5000 per violation.⁴⁴

The scope of the Act embraces both land use control and consumer protection. Some confusion has been generated during enforcement efforts because these two areas of concern overlap within sections of the Act.⁴⁵ Both land use control and consumer protection, however, depend upon accurate statutory construction of the "subdivision" definitions and the elimination of definitional loopholes for their authority.

SELECT WESTERN CONSTRUES SUBDIVISION DEFINITION AGAINST THE STATE

In 1979 the New Mexico Court of Appeals rendered a divided opinion in *State v. Select Western Lands, Inc.*,⁴⁶ which remains the most current judicial interpretation of the "subdivision" definitions.⁴⁷ The court's reasoning in *Select Western*⁴⁸ and consideration of the major issues addressed by the court, statutory construction, "intent" of the subdivider, and purpose of the Act, are important in understanding the definitional weaknesses.

In order to dispose of a Santa Fe County ranch originally purchased for development, Select Western listed the entire 3400 acre tract for sale with a licensed New Mexico realtor. Over a two year period, without preparing a plat, without applying for or receiving county approval, and without otherwise adhering to the Act, Select Western sold over 40 parcels

criminal intent making conviction under the Act difficult. If a violation of the Act became a strict liability crime and civil penalties were imposed, conviction of violators would be easier.

41. N.M. STAT. ANN. §§ 57-12-1 to -16 (1978). Interview with Anita P. Miller, *supra* note 19.

42. N.M. STAT. ANN. §§ 47-6-17, -18 (1978 & Repl. Pamp. 1982).

43. N.M. STAT. ANN. § 57-12-8 (1978). Interview with Anita P. Miller, *supra* note 19.

44. N.M. STAT. ANN. § 57-12-9 (1978). Interview with Anita P. Miller, *supra* note 19.

45. N.M. STAT. ANN. § 47-6-17 (1978 & Repl. Pamp. 1982) requires disclosure for type-one, type-two, or type-four subdivisions, as required by the board of county commissioners, for subdivisions with twenty-five or more parcels but less than one hundred lots and for subdivisions with one hundred or more parcels. N.M. STAT. ANN. § 47-6-18 (1978 & Repl. Pamp. 1982) requires disclosure statements and advertising of any form relating to subdivided land be filed with the board of county commissioners and the attorney general.

46. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979).

47. See discussion, *supra* note 21.

48. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979).

from within the 3400 acre tract to over 40 purchasers. The purchasers, who were referred by word of mouth, selected acreage by locating it on a boundary map of the ranch.⁴⁹ No survey or plat was prepared and conveyances were made by metes and bounds descriptions with references to U.S.G.S. section and quarter section corners only.⁵⁰

In 1977 the state filed a criminal complaint against Select Western for violation of the 1973 Act charging the developer with illegal subdivision and sale of land parcels. A Santa Fe District Court convicted Select Western of 18 counts of violating the Act.⁵¹ In 1979, the New Mexico Court of Appeals reversed.⁵² Strictly construing the Act against the state, the majority held that mere dividing of land into one parcel at any one time with one parcel remaining after each sale without direct evidence of an "intent" to "subdivide" by the owner did not constitute "subdivision" within the meaning of the Act.⁵³

Statutory Construction

The court agreed that the enactment of subdivision laws was a proper exercise of police power. But since the Act was in derogation of the common law and restricted the free use of property, the majority found that the Act was to be strictly construed against the governmental body attempting to enforce it.⁵⁴ Writing for the court, Judge Walters "emphasized the use of the present participle in 'creating' in Subsection (H) and the retained land exclusion in Subsection (I)(1) and determined that the aim of the legislature was to regulate only the ongoing activity of selling land divided prior to sale and not divisions or sales that were completed."⁵⁵

Judge Walters focused on the basic "subdivision" definition and found that "*has been divided . . . into five or more parcels for the purpose of sale*" meant that unless five divisions appeared on a survey or plat prior to sale, a "subdivision" had not been created.⁵⁶ In Judge Walters' opinion

49. Transcript of Record at 48, *Select Western*, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979).

50. Defendant-Appellant's Brief in Chief at iv., 12. Metes and bounds description is a way of describing land by listing compass directions and distances of boundaries with reference to the United States Government Survey System. BLACK'S LAW DICTIONARY 894 (5th ed. 1979). Often referred to as a "legal" description, it is less expensive to obtain than a plat prepared by a registered land surveyor.

51. Plaintiff-Appellee's Answer Brief at i., *Select Western*, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979).

52. *Select Western*, 94 N.M. at 560, 613 P.2d at 430.

53. *Id.* at 559, 613 P.2d at 429.

54. *Id.* at 558, 613 P.2d at 428.

55. SUBDIVIDING LAND, *supra* note 14 (Supp. 1981), at 6.

56. *Select Western*, 94 N.M. at 559, 613 P.2d at 429 (emphasis added).

the district court's liberal statutory construction increased the ambiguity and rendered the retained land exception ineffective.⁵⁷

Intent of the Subdivider

Judge Walters reviewed Select Western's conduct. Based on the evidence that no solicitation of sales occurred, no advertising was done, and no predesignated lots were offered for sale, the court held that Select Western had never "intended" to violate the subdivision statute and could not be convicted of violating the Act. Judge Sutin agreed that Select Western had never "desired" to "subdivide" the land and that absent the "desire" to "subdivide" no duty to obtain a plat arose.⁵⁸

The opinion interprets the basic "subdivision" definition as requiring the landowner to manifest by some overt conduct a clear indication of an "intent" to subdivide. However Select Western's conduct demonstrated one way in which a landowner can avoid any overt conduct which might be construed as "intent" to subdivide and thus evade the Act's authority. While concentrating on strict statutory construction, the opinion ignores the actual result of Select Western's activities: a 40 plus parcel subdivision lacking county plat approval.

Purpose of the Act

Judge Walters found that the Act was "intended" to apply to those developers who, for the purpose of sale, pursue a regular plan of dividing a tract into 25 or more specific parcels and not to Select Western's operation.⁵⁹ This statement displays some confusion over the difference between the "subdivision"⁶⁰ definition and the "type-four subdivision"⁶¹ definition. The "subdivision" definition requires plat approval for any division of "five or more parcels." The "type-four subdivision" definition is a "subdivision" classification used once "subdivision" has been ascertained which provides the basis for specific approval requirements. Judge Walters also suggests that the "intent" of the Act is simply to regulate large land developers and/or volume land sales.⁶² In fact subdivision regulation promotes orderly and planned growth of any undeveloped area regardless of the size or volume of sales involved.⁶³

Judge Sutin noted that the land use protection which the Act was

57. *Id.*

58. *Id.* at 561, 613 P.2d at 431 (Sutin, J., concurring).

59. 94 N.M. at 560, 613 P.2d at 430.

60. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982).

61. N.M. STAT. ANN. § 47-6-2(O) (1978 & Repl. Pamp. 1982). *See also* discussion, *supra* note 32.

62. 94 N.M. at 560, 613 P.2d at 430.

63. *See* discussion, *supra* note 12.

designed to provide occurred *after* the creation of a "subdivision" and *not before* so that the protection provided by the Act disappeared in the absence of a "subdivision."⁶⁴ This interpretation of the Act's purpose reflects a critical misunderstanding of the very basis for subdivision regulation.⁶⁵ If the counties cannot withhold plat approval and require compliance with the subdivision regulations *before* subdivision, the Act's authority would be worthless. If the land use controls, environmental protection, and consumer protection occurred *after* a subdivision had already been created, the counties' powers as mandated by the Act would be substantially undermined if not defeated.

Dissenting, Judge Hernandez said that the Act was clearly intended to impose strict liability, that even an "unintentional" violation created liability, and that Select Western should be held liable for the result of its conduct.⁶⁶ Judge Hernandez thought that the majority's interpretation rendered the Act meaningless and adherence to a literal construction of the "subdivision" definition created an absurdity contrary to the obvious spirit of the Act.⁶⁷

1981 AMENDED DEFINITIONS STILL AFFORD INTERPRETATIONAL LOOPHOLES

In an attempt to eliminate the statutory construction problems encountered in *Select Western*,⁶⁸ the legislature amended the "subdivision" definitions.⁶⁹ A "subdivider"⁷⁰ is now defined as:

any person creating *or who has created* a subdivision *individually or as part of a common promotional plan* or any person engaged in the sale or lease of subdivided land which is being sold or leased *or has been sold or leased within the preceding three years* by the owner in the ordinary course of business.

64. 94 N.M. 561, 613 P.2d at 431 (Sutin, J., concurring).

65. Some interpret the New Mexico Subdivision Act as being enacted to ensure complete disclosure of subdivided land conditions prior to sale (e.g., that the subdivision is dry and all water must be hauled in). Interview with Anita P. Miller, *supra* note 19. Some say the Act was intended to prevent subdivision of any land until county regulations can be met (i.e., denying plat approval when county water systems, water wells, and hauling systems are not yet available).

66. One of Select Western's arguments was that criminal statutes require clear and unambiguous notice when an actor is exposed to criminal sanctions and therefore the Act should be held void for vagueness. Defendant-Appellant's Brief in Chief at 23-24. The court construed N.M. STAT. ANN. § 47-6-27 (1978) as requiring a mens rea of specific intent where the burden of proof is higher than a showing of general criminal intent. SUBDIVIDING LAND, *supra* note 14 (Supp. 1981), at 17. New Mexico Subdivision Act, ch. 148, 1981 N.M. LAWS 913 amended N.M. Stat. Ann. § 47-6-27 (1978) to require only general criminal intent.

67. *Select Western*, 94 N.M. at 562, 613 P.2d at 432 (Hernandez, J., dissenting).

68. See discussion, *supra* note 11.

69. See discussion, *supra* note 21.

70. N.M. STAT. ANN. § 47-6-2(H) (1978 & Repl. Pamp. 1982). Italicized words indicate 1981 amendments.

And a new definition was added for a "common promotional plan":⁷¹

any plan or scheme of operation, undertaken by single subdivider or a group of subdividers acting in concert, to offer for sale or lease parcels of land where such land is either contiguous, or part of the same area of land, or is known, designated or advertised as a common unit or by a common name.

Whether a person is a "subdivider"⁷² and whether his activity is construed as "subdivision"⁷³ under the Act now depends upon a unified construction of the amended definitions.

Interpretational loopholes in the Act's definitions occur on two different levels. The first level consists of ambiguities and indefiniteness within the definitions themselves. *Select Western*⁷⁴ demonstrates this type of problem and the confusion which may result from judicial interpretation of the definitions. The second level consists of express exclusions⁷⁵ within the definitions which result in "legal" subdivisions not subject to the Act. Exempt from compliance with the Act's provisions, the "legal" subdivisions may still create the same environmental and consumer protection problems which the Act was meant to prevent. Both types of loopholes create situations⁷⁶ where the counties may be forced to resort to tax increases in order to pay for a subdivision's development requirements.

The attorney general has said that the state must consider the substance rather than the appearance of a land division and whether the transaction was bona fide and conducted at arm's length.⁷⁷ However, even if a court were to consider the substance rather than the appearance of a land division, if the transaction cannot be defined as "subdivision"⁷⁸ within the meaning of the Act the court could not require compliance or convict anyone for violation of the statute.

The basic "subdivision" definition is the analytical starting point for determining whether a landowner may be required to comply with the Act. If the "subdivision" is *not* (1) made by a "subdivider," (2) five or more parcels, (3) made within three years, or (4) for the purpose of sale

71. New Mexico Subdivision Act, ch. 148, 1981 N.M. Laws 913 added N.M. STAT. ANN. § 47-6-2(K) (1978 & Repl. Pamp. 1982) and redesignated former (K), (L), (M), (N), (O) as present (L), (M), (N), (O), (P).

72. N.M. STAT. ANN. § 47-6-2(H) (1978 & Repl. Pamp. 1982).

73. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982).

74. See discussion, *supra* note 11.

75. N.M. STAT. ANN. § 47-6-2(I)(1)-(8) (1978 & Repl. Pamp. 1982).

76. Examples include: (1) ground water and stream contamination due to improper soil percolation from septic systems; and (2) the need to haul water into dry subdivisions where people are already living. Interview with Anita P. Miller, *supra* note 19.

77. SUBDIVIDING LAND, *supra* note 14, at 22.

78. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982).

or lease, then the "subdivision" activity may not be subject to the Act. Each of these four conditions contain definitional loopholes which may exempt the landowner from compliance with the subdivision regulations.

The first condition requires divisions to be made by a "subdivider," which necessitates reference to the "subdivider" definition. If the "person"⁷⁹ cannot be construed as a "subdivider" within the meaning of the Act the land divisions which he created may be exempt. A court must prove that the "person" was in fact a "subdivider" before it even considers whether the three other conditions in the definition create an exemption under the circumstances.

Because the "subdivision" definition focuses on the acts of the "subdivider" rather than the land itself, the "subdivider" definition was designed to be as broad as possible.⁸⁰ Consistent with this approach, the 1981 amendments included reference to a "common promotional plan"⁸¹ within the "subdivider" definition. The "common promotional plan" definition is intended to notify subdividers that business arrangements formed to sell subdivided land result in each individual being considered a "subdivider" and liable for violating the Act.⁸² But what constitutes a "common promotional plan" is also a question of fact.⁸³ If there is no evidence of any "desire to act in concert" with other "persons," even if the resulting development may indicate otherwise, a narrow statutory construction could exempt that landowner from compliance with the Act's provisions.

The second condition requires the creation of "five or more parcels." If less than five lots are created, then the divisions are exempt from compliance with the subdivision regulations. Confusion arises when one or more of the divisions falls within the eight express exclusions.⁸⁴ How to calculate the actual number of divisions while giving effect to allowable exclusions creates construction problems similar to those faced in *Select Western*.⁸⁵ If seven lots are created and three fall within the exclusions, or if numerous parcels are created and all fall within the exclusions, the subdivision activity may be exempt. If the state, district attorney, and/or the board of county commissioners discover what has occurred, the prosecution must object to the use of the exclusions and the method used to calculate the number of divisions. Proof of and a finding of general

79. N.M. STAT. ANN. § 47-6-2(C) (1978 & Repl. Pamp. 1982) defines a "person" as "any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity."

80. SUBDIVIDING LAND, *supra* note 14, at 23.

81. N.M. STAT. ANN. § 47-6-2(K) (1978 & Repl. Pamp. 1982).

82. Baehr, *Property*, 12 N.M.L.Rev. 479 (1982).

83. SUBDIVIDING LAND, *supra* note 14, at 23.

84. N.M. STAT. ANN. § 47-6-2(I)(1)-(8) (1978 & Repl. Pamp. 1982).

85. See discussion, *supra* note 11.

criminal intent by the "subdivider" is then required for any conviction of violating the Act.⁸⁶

By expressly excluding land divisions of less than five parcels, the second condition focuses on the number of land divisions rather than the land involved in a transaction.⁸⁷ This approach ignores the amount of acreage involved, proposed development densities, types of land use, and specific environmental problems as well as a county's need to control a particular land use within a specific locale. Total acreage which might be legally exempt from a county's authority could range from five acres to 100,000 acres.⁸⁸

The third condition limits affected divisions to those made "within three years" calculated retrospectively from the present date of sale. The 1981 amendments were designed to clarify the fact that the cumulative acts of dividing five or more parcels for the purpose of sale or lease within a three year period, whether accomplished all at once or one at a time, constitute the creation of a "subdivision" under the Act. A subdivision, however, could legally divide four parcels for sale and retain the fifth until the three year limitation has expired and then divide the retained fifth parcel into four more parcels for sale and retain the fifth parcel until hundreds of lots have been created.⁸⁹ By ensuring that the serial divisions occur *after* three years and not more than four lots have been sold at a time, landowners can "legally" avoid county subdivision regulation.

The fourth condition requires division to be made "for the purpose of sale or lease." Gifts, inheritance settlements, and court ordered partitions not "for the purpose of sale or lease" which create land divisions do not constitute "subdivision" under the Act. Disguised gifts, phoney family divisions, and contrived court ordered partitions have been used to circumvent the subdivision regulations.⁹⁰ Whether a particular series of divisions have been made legally outside "the sale or lease" requirements is a question of fact with the burden of proof on the state.

The eight express exclusions⁹¹ listed in the "subdivision" definition have been used creatively and legally to avoid the Act's provisions. Subsection (1) which excludes land retained by the subdivider, and Sub-

86. The actual divisions may take place without anyone having to inform the county or the clerk prior to the transaction. Enforcement officers generally only hear about such activity when well or building permits are requested or someone files a complaint with the consumer division of the attorney general's office.

87. SUBDIVIDING LAND, *supra* note 14 at 23, 64.

88. Numbers are used for exemplary purposes only.

89. SUBDIVIDING LAND, *supra* note 14 (Supp. 1981), at 6.

90. SUBDIVIDING LAND, *supra* note 14, at 25.

91. N.M. STAT. ANN. § 47-6-2(I)(1)-(8) (1978 & Repl. Pamph. 1982).

section (5) which excludes court ordered partitions are used the most frequently to circumvent compliance requirements.⁹²

The New Mexico Subdivision Act's requirements currently combine with a county's regulations to create a regulatory maze which even the most sophisticated subdividers dread. When a person considers subdividing and looks at the inevitably lengthy and costly approval processes,⁹³ it is not surprising that he might consider ways of avoiding the Act's authority altogether or that he chooses the most obvious means, definitional loopholes and express exclusions for circumventing the Act's mandates. Any revision of the "subdivision"⁹⁴ definitions, therefore, must address interpretational loopholes from a perspective of regulatory simplification.⁹⁵

OPTIONS FOR CHANGE

Incorporate an "Intent" Section into the Statute

Addition of an "Intent"⁹⁶ section to the New Mexico Subdivision Act should be considered. The differences between zoning ordinances⁹⁷ and subdivision regulations,⁹⁸ as well as the limit of police power as a regulatory tool in regard to private property rights,⁹⁹ may create misunderstandings. The primary source of confusion, however, is the statute itself which does not contain a clear expression of the legislature's intent in enacting the New Mexico Subdivision Act.

The *Select Western* opinions¹⁰⁰ illustrate the judiciary's confusion over

92. Since it is easiest to comply with these two exclusions, they are the most frequently used. Professional experience of the author, Master of Architecture in Design & Planning, University of Michigan, Licensed Architect, State of New Mexico. The author's experience includes work as a designer and planner in both the public and private sectors for over 10 years.

93. See discussion, *supra* note 3.

94. N.M. STAT. ANN. § 47-6-2(G), (H), (I), (K) (1978 & Repl. Pamph 1982).

95. Adoption of the municipal "subdivision" definition would simplify administrative procedures. See *infra* text accompanying notes 112-21. Professional experience of author, *supra* note 92.

96. Tampa, Florida's subdivision regulations include a legislative finding in Section 1 which provides in part: The following standards and regulations are designed to provide for the harmonious development of the City . . . to secure coordinated layout and adequate provision for traffic and also to secure adequate provisions for light, air, recreation, transportation, water, drainage, sewer and other sanitary facilities." Tampa, Fla., Interim Zoning Regulations § 1 (1962). 3 R.M. ANDERSON, AMERICAN LAW OF ZONING § 19.03 (1968).

97. Zoning is the division of a municipality into districts and the prescription and application of different regulations in each district. Zoning regulations include: (1) regulations of height and bulk of buildings within certain designated districts; and (2) regulation of building use within certain designated districts. 3 R.M. ANDERSON, AMERICAN LAW OF ZONING § 1.12 (1968).

98. See discussion, *supra* note 12.

99. Defendant-Appellant's Brief in Chief at 21.

100. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979). Judge Walters writing for the court expressed one understanding of the purpose of the New Mexico Subdivision Act, while Judge Sutin concurring specially and Judge Hernandez dissenting, each expressed totally different understandings of the purpose of the Act. See *supra*, text accompanying notes 59-67.

the Act's purpose which may increase if more conflicts are referred to the courts. If, however, a succinct and unambiguous "Intent" section is incorporated into the Act the judiciary could refer directly to the legislature's intent during statutory construction. Enforcement officers could use the "Intent" section to demonstrate how a specific activity might be in direct conflict with the purpose of the Act. A court could then compare the substance of the transaction with the result of strict statutory construction.

Consolidate Land Use Controls and Develop Comprehensive County Plans

The counties should consolidate land use controls and develop comprehensive plans¹⁰¹ which address zoning,¹⁰² subdivision regulation,¹⁰³ and development policies in a coherent fashion.¹⁰⁴ Both subdivision regulations and zoning ordinances are standard components of land use control based on the police power of the state. Historically subdivision regulations and zoning ordinances have been designed separately. Recently, however, the need and advantages of considering zoning and subdivision regulation together within a comprehensive planning framework have become obvious.¹⁰⁵ Comprehensive plans have become a necessity in order to minimize the tax burden of development, preserve environmental assets, simplify regulations, and defend administrative decisions.¹⁰⁶

Countywide plans should encourage appropriate and innovative development. Currently, most projects are initiated by developers and the county simply reacts to the proposal. If comprehensive plans were de-

101. A comprehensive plan may be utilized as a legal tool to restrict land use and implement planning. 3 R.M. ANDERSON, *AMERICAN LAW OF ZONING* § 17.03 (1968). Development of countywide comprehensive plans would require substantial financial and professional resources not currently available in many counties. See N.M. STAT. ANN. §§ 3-19-9 to -12 (1978); N.M. STAT. ANN. § 3-21-5 (1978).

102. Under N.M. STAT. ANN. §§ 3-21-1 to -26 (1978) counties have the power to zone but few counties have zoning maps or plans. See discussion, *supra* note 97.

103. See discussion, *supra* note 12.

104. The City of Albuquerque and Bernalillo County have developed comprehensive land use control laws which include a policies plan, a zoning code, a zone atlas, a subdivision ordinance, and a development procedures manual. The development manual delineates the procedures required for approval of any type of development project proposal including subdivisions. Professional experience of author, *supra* note 92.

105. If when a new subdivision is designed, the zoning restrictions are designed as an integral part of the development, the potential for conflict between zoning and subdivision regulations is minimized. CENTER FOR ENVIRONMENTAL RESEARCH AND DEVELOPMENT, UNIVERSITY OF NEW MEXICO, *A PROPOSED ZONING ENABLING LAW FOR NEW MEXICO COUNTIES*, 54 (1975). Simultaneous design of building types, building heights, lot sizes, and setbacks promotes innovative design and consistent regulations. Doubilet, *A Venerable Town Pattern Reemerges*, *Progressive Architecture*, August 1984, at 74. See also professional experience of author, *supra* note 92.

106. 3 R.M. ANDERSON, *AMERICAN LAW OF ZONING* § 17.04 (1968).

veloped the counties could locate land uses where they would benefit the community.¹⁰⁷ Zoning ordinances could relate directly to specific areas where subdivisions were planned or recommended.¹⁰⁸ The comprehensive plan could address subdivision regulation from a performance criteria perspective, a technique which some New Mexico counties have already begun using.¹⁰⁹

In addition, a comprehensive plan provides additional legal muscle for the county should the county decide to deny plat approval based on planning and/or environmental considerations. If plat approval were denied, the board of county commissioners could show that the denial decision was neither arbitrary nor capricious¹¹⁰ because it was made based on a comprehensive plan.¹¹¹

Counties Should Adopt the Municipal Subdivision Definition

Any revisions of the "subdivision"¹¹² definitions should consider adoption of the Municipal Subdivision Act's¹¹³ "subdivision"¹¹⁴ definition of "the division of land into two or more parts by platting or metes and bounds description into tracts. . . ." For county subdivisions located within the three or five mile municipal extraterritorial jurisdiction,¹¹⁵ the county

107. A comprehensive plan permits the county to take the development initiative. See N.M. STAT. ANN. § 3-20-5 (1978). Professional experience of author, *supra* note 92.

108. For example an R-3 zone permitting a higher density residential subdivision could be located in an area where the county could easily extend existing water and sewer lines.

109. Santa Fe County has developed subdivision regulations based on performance standards. Bernalillo County is currently working on an East Mountain Area Plan which incorporates performance standards. An example of a performance standard is permitting acreage divisions based upon the capacity of the water table to support the proposed development density (i.e., 5 acre minimum lots for residential use in areas with water shortages). Professional experience of author, *supra* note 92.

110. N.M. STAT. ANN. § 47-6-15(C) (1978 & Repl. Pamph. 1982) provides "[u]pon appeal, the district court shall set aside the action of the board of county commissioners or its delegate only if it is found to be: (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence; or (3) otherwise not in accordance with law."

111. N.M. STAT. ANN. § 3-21-5 (1978) requires zoning regulations to be in accordance with a comprehensive plan. Recent opinions in Board of County Comm'rs v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980) and City of Albuquerque v. Paradise Hills Special Zoning Dist. Comm'n, 99 N.M. 630, 661 F.2d 1329 (1983) held that no zoning could occur without a plan. The comprehensive plan, while required for zoning, also provides substantial weight for subdivision plat actions and may be necessary in the future to uphold a board of county commissioners' denial of plat approval. Professional experience of author, *supra* note 92.

112. N.M. STAT. ANN. § 47-6-2(G), (H), (I), (K) (1978 & Repl. Pamph. 1982).

113. N.M. STAT. ANN. §§ 3-20-1 to -16 (1978 & Cum. Supp. 1984).

114. N.M. STAT. ANN. § 3-20-1 (1978 & Cum. Supp. 1984).

115. N.M. STAT. ANN. § 3-19-5 (1978) grants each municipality planning and platting jurisdiction within its municipal boundary as well as what is commonly referred to as "extraterritorial jurisdiction" for the purposes of planning and platting. The statute extends planning and platting jurisdiction for municipalities:

(1) having a population of twenty-five thousand or more persons includes all territory

must already consider the municipal "subdivision" definition because of concurrent jurisdiction between the counties and municipalities over subdivision approval.¹¹⁶ Adoption of this definition would eliminate the need for the "subdivider" and "common promotional plan" definitions, simplify the county "subdivision" definition immensely, address the majority of existing enforcement difficulties, and increase the Act's effectiveness.

Changing the county "subdivision" definition would probably increase county workloads¹¹⁷ but each county might adopt expedited procedures for less than five lots based upon the acreage involved and the potential environmental impact of the land division on the county's infrastructure.¹¹⁸ Requiring approval of all land divisions "into two or more parts" would permit the county to monitor development within its boundaries and make decisions concerning actual land use on a site specific basis. Permitting subdivision by *either* platting or metes and bounds descriptions would help reduce the cost of "subdivision" activity and plat approval for small subdividers.

Finally, changing the county definition of "subdivision" to conform to the municipal definition would permit the counties to focus on land divisions rather than being concerned with statutory construction of the "subdivision" definitions and whether the Act might apply under specific circumstances.¹¹⁹ Violations of the Act would be easier to prosecute¹²⁰ and county land records would be more complete.¹²¹ Most importantly, adoption of the municipal "subdivision" definition would affirm the counties' authority to implement county planning through subdivision regu-

within five miles of its boundary and not within the boundary of another municipality;
or
(2) having a population of less than twenty-five thousand persons includes all territory within three miles of its boundary and not within the boundary of another municipality.

116. N.M. STAT. ANN. § 3-20-5 (1978).

117. The municipal "subdivision" definition would require approval of more plats by the board of county commissioners and increase the number of plats required to be filed. Professional experience of author, *supra* note 92.

118. For example, any subdivisions in areas with existing roads, water systems, and sewage systems, could receive summary approval. Professional experience of author, *supra* note 92.

119. The current county "subdivision" definitions require considerable time and scrutiny to determine whether the Act applies. County personnel are often requested to make an administrative determination based on limited information and minimal legal knowledge. Adoption of the municipal "subdivision" definition would make compliance determinations much simpler for county administrators. Professional experience of author, *supra* note 92.

120. If all land divisions of two or more parts required plat approval, anyone who divided land without having the divisions approved and filed would be in violation of the Act. This would create a strict liability statute. Professional experience of author, *supra* note 92.

121. Since land divisions of less than five parcels are not required to be approved and filed, numerous divisions occur without any record of the transaction. By requiring all land divisions of two or more parts to be approved and filed, the county would have a record of all new transactions after the effective date. Professional experience of author, *supra* note 92.

lation and ensure protection of New Mexico's public health, safety, and welfare.

CONCLUSION

The New Mexico Subdivision Act¹²² must contain clear and simple definitions if the counties intend to maintain control of the accelerating pace and increasing volume of land development in New Mexico. *Select Western*¹²³ stands for the proposition that the most expedient method of avoiding the Act's authority is to ensure that a person cannot be construed as a "subdivider"¹²⁴ or his activities construed as a "subdivision"¹²⁵ within the meaning of the Act. If the current definitional loopholes are allowed to stand the Act's and the counties' authority over subdivision activity, their ability to enforce land use controls, and their power to protect both the consumer and the environment may be severely limited in the future.

AMY LANDAU

122. N.M. STAT. ANN. §§ 47-6-1 to -29 (1978 & Repl. Pamp. 1982).

123. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979).

124. N.M. STAT. ANN. § 47-6-2(H) (1978 & Repl. Pamp. 1982).

125. N.M. STAT. ANN. § 47-6-2(I) (1978 & Repl. Pamp. 1982).